

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TODD ASHKER and DANNY TROXELL,
Plaintiffs,
v.
ARNOLD SCHWARZENEGGER, et al.,
Defendants.

No. C 05-03286 CW (PR)

ORDER GRANTING IN PART
DEFENDANTS' MOTION TO
DISMISS AND DENYING IT IN
PART AND DENYING IN PART
PLAINTIFFS' MOTION TO
AMEND COMPLAINT

(Docket Nos. 75, 89, 94,
98, and 103)

Plaintiffs Todd Ashker and Danny Troxell are state prisoners incarcerated at Pelican Bay State Prison (PBSP). Plaintiffs filed a civil rights complaint for damages, injunctive relief and declaratory relief pursuant to 42 U.S.C. § 1983. Defendants move to dismiss Plaintiffs' first, third, fourth and fifth causes of action for failure to exhaust their administrative remedies.¹ Plaintiffs oppose the motion. For the reasons discussed below, the Court GRANTS in part Defendants' motion to dismiss and DENIES it in part AND DENIES in part Plaintiffs' motion to amend their complaint.

BACKGROUND

The following facts are taken from Plaintiffs' First Amended Complaint (FAC). Plaintiffs are incarcerated at the PBSP Special Housing Unit (SHU). Ashker was sentenced to a six year prison term

¹Defendants do not move to dismiss Plaintiffs' second cause of action for a First Amendment violation based on Defendants' banning certain magazines, or the state law causes of action for negligence (sixth cause of action) and for intentional tort (seventh cause of action).

1 for burglary in 1984. In 1990, he was convicted of second-degree
2 murder of another inmate at PBSP and was sentenced to a prison term
3 of twenty-one years to life. Ashker has been housed in the SHU at
4 PBSP since 1990. Troxell plead guilty to first-degree murder in
5 1979 and is serving a sentence of twenty-six years to life.
6 Troxell has been housed in the SHU since 1989.

7 Plaintiffs were placed in the SHU because of their alleged
8 membership in or association with the Aryan Brotherhood (AB) prison
9 gang; they were each re-validated as gang members on July 8, 2003.
10 Both deny that they are AB members or associates. Due to their
11 alleged gang associations, they are housed in the SHU on
12 "indeterminate" status. FAC at ¶¶ 6, 7, and 8. According to
13 Plaintiffs, California Department of Corrections and Rehabilitation
14 (CDCR)² policy is that Plaintiffs cannot be released from the SHU
15 unless they are paroled, they debrief or they are inactive in gang
16 activity for a period of six years. FAC at ¶ 13.

17 "Debriefing is the process by which a gang
18 coordinator/investigator determines whether an inmate/parolee
19 (subject) has dropped out of a gang." Cal. Code Regs. tit. 15,
20 § 3378.1(a). "The object of the debriefing is to learn enough
21 about the subject and the subject's current gang to: (1) allow
22 staff to reasonably conclude that the subject has dropped out of
23 the gang, and (2) allow staff to reclassify the subject. . . "
24 Cal. Code Regs. tit. 15, § 3378.1(b).

25 Plaintiffs filed the present action on August 11, 2005. This

26
27 ²The California Department of Corrections and Rehabilitation
28 was formerly known as the California Department of Corrections.

1 action raises claims, originally filed on May 19, 2004, that were
2 previously dismissed without prejudice in Ashker v. Schwarzenegger,
3 2006 U.S. Dist. LEXIS 14625 (N.D. Cal.). Plaintiffs filed their
4 FAC on January 30, 2006.

5 LEGAL STANDARD

6 I. Exhaustion

7 Title 42 U.S.C. § 1997e(a), amended by the Prison Litigation
8 Reform Act of 1995 (PLRA), provides, "No action shall be brought
9 with respect to prison conditions under [42 U.S.C. § 1983], or any
10 other Federal law, by a prisoner confined in any jail, prison, or
11 other correctional facility until such administrative remedies as
12 are available are exhausted." This exhaustion requirement only
13 applies to cases filed after the PLRA's passage on April 26, 1996.
14 Bennett v. King, 293 F.3d 1096, 1097-98 (9th Cir. 2002).

15 Exhaustion is mandatory and no longer left to the discretion
16 of the district court. Woodford v. Ngo, 126 S. Ct. 2378, 2382
17 (2006) (citing Booth v. Churner, 532 U.S. 731, 739 (2001)).
18 "Prisoners must now exhaust all 'available' remedies, not just
19 those that meet federal standards." Id. Even when the relief
20 sought, such as monetary damages, cannot be granted by the
21 administrative process, a prisoner must still exhaust
22 administrative remedies. Id. at 2382-83 (citing Booth, 532 U.S. at
23 734).

24 The purposes of exhaustion are to provide the administrative
25 agency a full and fair "opportunity to correct its own mistakes
26 with respect to the programs it administers before being haled into
27 federal court," and to promote efficiency by encouraging claims to
28

1 be settled at the administrative level or by providing a useful
2 record for subsequent judicial consideration. Woodford, 126 S. Ct.
3 at 2385.

4 An action must be dismissed unless the prisoner exhausted his
5 or her available administrative remedies before he or she filed
6 suit, even if the prisoner fully exhausts while the suit is
7 pending. McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002);
8 Vaden v. Summerhill, 449 F.3d 1047, 1051 (9th Cir. 2006) (where
9 administrative remedies are not exhausted before the prisoner sends
10 his complaint to the court it will be dismissed even if exhaustion
11 is completed by the time the complaint is actually filed). The
12 PLRA does not require dismissal of the entire complaint when a
13 prisoner has failed to exhaust some, but not all, of the claims
14 included in the complaint. Jones v. Bock, 127 S. Ct. 910, 925-26
15 (2007) (rejecting "total exhaustion-dismissal" rule); Lira v.
16 Herrera, 427 F.3d 1164, 1170 (9th Cir. 2005).

17 The PLRA exhaustion requirement calls for "proper exhaustion"
18 of available administrative remedies. Woodford, 126 S. Ct. at
19 2387. "Proper exhaustion demands compliance with an agency's
20 deadlines and other critical procedural rules because no
21 adjudicative system can function effectively without imposing some
22 orderly structure on the course of its proceedings." Id. at 2386.
23 Compliance with prison grievance procedures is all that is required
24 by the PLRA to "properly exhaust." Jones, 127 S. Ct. at 922-23.
25 The level of detail necessary in a grievance to comply with the
26 grievance procedures will vary from system to system and claim to
27 claim, but it is the prison's requirements, and not the PLRA, that
28

1 define the boundaries of proper exhaustion. Id. at 923.

2 II. Affirmative Defense

3 Non-exhaustion under § 1997e(a) is an affirmative defense.
4 Jones, 127 S. Ct. at 922-23; Wyatt v. Terhune, 315 F.3d 1108, 1119
5 (9th Cir.), cert. denied, 540 U.S. 810 (2003). Defendants have the
6 burden of raising and proving the absence of exhaustion, and
7 inmates are not required specifically to plead or demonstrate
8 exhaustion in their complaints. Jones, 127 S. Ct. at 921-22.

9 A non-exhaustion claim should be raised in an unenumerated
10 Rule 12(b) motion rather than in a motion for summary judgment.
11 Wyatt, 315 F.3d at 1119. In deciding a motion to dismiss for
12 failure to exhaust non-judicial remedies, the court may look beyond
13 the pleadings and decide disputed issues of fact. Id. at 1119-20.³

14 III. State Administrative Remedies

15 The State of California provides its inmates and parolees the
16 right to appeal administratively "any departmental decision,
17 action, condition or policy perceived by those individuals as
18 adversely affecting their welfare." Cal. Code Regs. tit. 15,
19 § 3084.1(a). In order to exhaust available administrative remedies
20 within this system, a prisoner must proceed through several levels
21 of appeal: (1) informal resolution, (2) formal written appeal on a
22 CDCR 602 inmate appeal form, (3) second level appeal to the

23
24 ³ If the court looks beyond the pleadings in deciding an
25 unenumerated motion to dismiss for failure to exhaust -- a
26 procedure closely analogous to summary judgment -- the prisoner
27 must have fair notice of his opportunity to develop the record.
Wyatt, 315 F.3d at 1120 n.14. Because Plaintiffs have filed many
documents supporting their opposition, the Court concludes that
they have had fair notice to develop the record.

1 institution head or designee, and (4) third level appeal to the
2 Director of the CDCR. Id. § 3084.5; Barry v. Ratelle, 985 F. Supp.
3 1235, 1237 (S.D. Cal. 1997). This satisfies the administrative
4 remedies exhaustion requirement under 42 U.S.C. § 1997e(a). Id. at
5 1237-38.

6 DISCUSSION

7 Defendants move to dismiss Plaintiffs' first, third, fourth
8 and fifth claims: (1) violation of First Amendment freedom to
9 associate; (3) violation of Fifth Amendment freedom against self-
10 incrimination, arising from the CDCR's debriefing requirement;
11 (4) violation of Eighth Amendment prohibition of cruel and unusual
12 punishment, also arising from the debriefing requirement; and
13 (5) (a) violation of the ex post facto clause of the United States
14 Constitution by transforming Plaintiffs' convictions with sentences
15 allowing for parole into sentences of life without the possibility
16 of parole, (b) violation of the due process clause of the
17 Fourteenth Amendment based on lack of access to prison programs due
18 to Plaintiffs' SHU status, which prevents them from being granted
19 parole, (c) violation of the equal protection clause of the
20 Fourteenth Amendment because of different treatment of white SHU
21 inmates, (d) violation of procedural and substantive due process
22 under the Fourteenth Amendment based on the deprivation of their
23 liberty interest in being granted parole, and (e) violation of
24 procedural and substantive due process by denying release from the
25 SHU based on their inactive status in the AB, when no reliable
26 evidence is presented to demonstrate participation in recent
27 illegal gang activity.

1 Defendants argue in their motion to dismiss that the Court
2 cannot decide the merits of these claims because Plaintiffs have
3 not satisfied the administrative exhaustion requirement. In
4 support of their argument for dismissal of the first, third, fourth
5 and fifth causes of action, Defendants submit declarations by
6 prison officials responsible for the administration and tracking of
7 inmate grievances. Defendants also submit copies of the grievances
8 filed by Plaintiffs that have been exhausted and the responses to
9 those grievances at the first, the second and the Director's levels
10 of review.

11 Plaintiffs argue that Defendants failed to establish that
12 Plaintiffs have not exhausted their available administrative
13 remedies as to the claims at issue. In support of their argument
14 that they have exhausted these claims, Plaintiffs submit copies of
15 a number of grievances they have filed.

16 I. Defendants' Evidence

17 Defendants provide the declaration of N. Grannis, Chief of
18 CDCR's Inmate Appeals Branch. Grannis states that the Inmate
19 Appeals Branch keeps an electronic record of each inmate appeal
20 that has proceeded through the final level of review, which is the
21 Director's Level, also referred to as the third level. Grannis
22 Dec. at ¶ 4. This electronic system was commenced in 1993. Id. A
23 search of the computerized system was conducted under Ashker's and
24 Troxell's names. Id. at ¶ 5. Attached Exhibits C and J are copies
25 of the computer printout of each appeal Ashker and Troxell,
26 respectively, filed beginning in the year 1997 that was accepted
27 for review at the Director's Level. Id. Attached Exhibits H and O
28

1 are copies of the computer printout results of Ashker's and
2 Troxell's appeals that were screened out. Id. at ¶ 7.

3 Based on my review of the inmate appeals listed in
4 Exhibits C and H, plaintiff ASHKER has not exhausted his
5 appeals at the Director's level related to grievances
6 for: (1) Gang debriefing, gang validation, or Fifth
7 Amendment right against self-incrimination as implicated
8 by the debriefing process, (2) parole policies of the SHU
9 inmates in an alleged "no parole policy" for SHU inmates;
10 (3) challenging the gang debriefing process as violating
11 the Eighth Amendment prohibition of cruel and unusual
12 punishment; (4) unequal treatment based on race; or (5)
13 violating the Ex Post Facto Clause of the Constitution
14 for imposing a release date later than originally
15 sentenced.

16 . . .

17 Based on my review of the inmate appeals listed in
18 Exhibits J and O, plaintiff TROXELL has not exhausted his
19 appeals at the Director's level related to grievances
20 for: (1) Gang debriefing, gang validation, or Fifth
21 Amendment right against self-incrimination as implicated
22 by the debriefing process, (2) parole policies of the SHU
23 inmates in an alleged "no parole policy" for SHU inmates;
24 (3) challenging the gang debriefing process as violating
25 the Eighth Amendment prohibition of cruel and unusual
26 punishment; (4) unequal treatment based on race;
27 (5) violating the Ex Post Facto Clause of the
28 Constitution for imposing a release date later than
originally sentenced; or (6) education, vocational, and
self-help programming in the Security Housing Unit.

Id. at ¶¶ 8 & 13.

19 Defendants also provide the declaration of D. Bradbury, the
20 PBSP appeals coordinator. Bradbury's duties include processing
21 inmate appeals, assigning appeals to the appropriate staff, and
22 monitoring and maintaining the computer database of inmate appeals.
23 Bradbury Dec. at ¶ 1. Exhibit A, attached to Bradbury's
24 declaration, is a computer printout from the inmate appeals office
25 showing Ashker's appeals history. Id. at ¶ 4. Bradbury states he
26 found the following:
27
28

1 Exhibit A shows that many of the inmate appeals were
2 never exhausted at the second level of the administrative
3 appeals process. A true and correct copy of the
4 following inmate appeals that were never exhausted at the
5 second level of the administrative appeals process is
6 attached as Exhibit B.

7 a. Inmate appeal bearing institutional log
8 number PBSP-C-03-2721 was received by the
9 inmate appeals office on October 10, 2003, and
10 the first level response was completed on
11 November 12, 2003. The appeal was not
12 submitted to the appeals office for the second
13 level of review.

14 Id. at ¶ 5.

15 Exhibit C, attached to Bradbury's declaration, is a computer
16 printout from the inmate appeals office showing Troxell's appeals
17 history. Id. at ¶ 7. Bradbury states he found the following:

18 Exhibit C shows that many of the inmate appeals were
19 never exhausted at the second level of the administrative
20 appeals process. A true and correct copy of the
21 following inmate appeals that were never exhausted at the
22 second level of the administrative appeals process is
23 attached as exhibit D.

24 a. Inmate appeal bearing institutional log
25 number PBSP-C-03-2720 was received by the
26 inmate appeals office on October 10, 2003, and
27 the first level response was completed on
28 November 12, 2003. The appeal was not
submitted to the appeals office for the second
level of review.

Bradbury Dec. ¶ 8.

The inmate appeal bearing institutional log number PBSP-C-03-
2721 is Ashker's appeal of his claim that being housed in the SHU
for reasons other than a serious disciplinary action should not
preclude him from receiving the same privileges as a General
Population inmate. Id., Ex. B. The inmate appeal bearing
institutional log number PBSP-C-03-2720 is Troxell's appeal of his
claim to the same effect. Id., Ex. D.

1 Defendants also provide the declaration of their counsel, B.
2 Kenny. Attached as exhibits to the Kenny declaration are the
3 administrative appeals filed by Ashker and Troxell with the Board
4 of Parole Hearings (BPH)⁴ relating to grievances from their parole
5 hearings. Kenny Dec., Ex. D. On January 13, 2004, Ashker
6 exhausted his remedies with the BPH regarding his appeal of the BPH
7 decision in which he contended that his ex post facto rights were
8 violated by a five year parole denial and that the BPH has a no-
9 parole policy for prisoners in indeterminate SHU status. Id.
10 Troxell's parole hearing was on July 10, 2001, and he filed his
11 appeal on October 29, 2003. Id. Because Troxell submitted his
12 appeal over ninety days after his parole hearing, the appeal was
13 dismissed as untimely. Id.

14 As noted above, Defendants bear the burden of proving that
15 Plaintiffs failed to exhaust their administrative remedies.
16 The documents and declarations produced by Defendants establish
17 that Plaintiffs failed to exhaust the administrative appeals
18 process for the first, third and fourth causes of action and some
19 of the claims in the fifth cause of action.

20 II. Exhaustion Analysis

21 A. Statute of Limitations

22 Respondents argue that the statute of limitations has run on
23 some of the causes of action in the complaint. The Court denies
24 without prejudice Defendants' motion to dismiss to the extent it is
25 based on the statute of limitations because they have not had an

26
27 ⁴The Board of Parole Hearings was formerly known as the Board
28 of Prison Terms (BPT).

1 opportunity to address Plaintiffs' arguments regarding the
2 continuing violations doctrine or equitable tolling; Plaintiffs
3 made these arguments in their supplemental opposition to
4 Defendants' motion to dismiss. Defendants may reassert the statute
5 of limitations argument in their next motion to dismiss or their
6 motion for summary judgment.

7 B. Grievances Where Exhaustion is Disputed

8 The parties dispute whether several grievances submitted by
9 Plaintiffs have been exhausted.

10 1. Ashker's Appeal 04-2600

11 This appeal challenges denial of a grievance about CDCR's
12 procedures for establishing gang validation and inactive gang
13 status. Id., Ex. 4 at 2. Defendants argue that Ashker did not
14 file this appeal within fifteen working days of the event or the
15 decision being appealed as required by California Code of
16 Regulations, title 15, section 3084.6(c). For this reason, this
17 appeal was screened out at the third level. Ashker Dec., Ex. 4 at
18 10. Section 3084.6(c) states that an "appellant must submit the
19 appeal within 15 working days of the event or decision being
20 appealed, or of receiving an unacceptable lower level appeal
21 decision." Proper exhaustion of a grievance requires "compliance
22 with an agency's deadlines and other critical procedural rules."
23 Woodford, 126 S. Ct. at 2382.

24 Ashker argues that the appeal was timely. He states that the
25 the action from which he appealed was the PBSP Institutional
26 Classification Committee's (ICC) annual review of his indeterminate
27 SHU status. The ICC issued a "chrono" which stated that it

1 retained Ashker's SHU/indeterminate status based on his validation
2 as a member of the AB. Ashker states that although the ICC's
3 decision was dated August 4, 2004, it wasn't until September 7,
4 2004 that he received the copy of the ICC "chrono" which advised
5 him of the committee's decision and of his right to appeal it.
6 Ashker states that he filed his appeal on September 15, 2004,
7 within fifteen days of his receipt of notice of the ICC's decision.
8 Ashker points out that Defendants processed the appeal as timely
9 through the first and second levels of review and denied it as
10 untimely only at the third level. Ashker contends that this was an
11 error in the third level review and, thus, the grievance is
12 exhausted.

13 Defendants do not respond the Ashker's argument. Because
14 there is a dispute of fact regarding the timeliness of this claim,
15 the Court denies Defendants' claim that this appeal was untimely.

16 2. "Group" Appeal 04-0566

17 Plaintiffs argue that this was a group appeal submitted on
18 behalf of Ashker and Troxell. Ashker Dec. ¶ 51. Defendants argue
19 that Plaintiffs did not meet the criteria for a group appeal.
20 California Code of Regulations, title 15, § 3084.2(f) provides that
21 a group appeal is acceptable when a group of inmates seeks to
22 appeal a decision, action or policy affecting all members of the
23 group. In that case, one appeal form can be filled out with the
24 name and departmental identification number of the inmate who
25 prepared the appeal. In addition, to qualify as a group appeal, "a
26 legible list of the participating inmates' names, signatures,
27 departmental identification numbers, and housing shall be attached
28

1 to the appeal." Cal. Code Regs. tit. 15, § 3084.2(f)(1).

2 Although the appeal begins, "This is an appeal on behalf of
3 Ashker and Troxell, B #76578 . . .," the appeal does not contain an
4 attached list of participating inmates' names and signatures as
5 required by § 3084.2(f)(1). Furthermore, Plaintiffs were put on
6 notice that Defendants considered this an appeal only on behalf of
7 Ashker because the First, Second and Third Level Reviewers'
8 Responses identify the inmate appealing as Ashker without any
9 mention of Troxell nor are there any references to the fact that it
10 is a group appeal. Therefore, Plaintiffs have not established that
11 Troxell is a party to this appeal.

12 3. "Group" Appeal 03-2721

13 Defendants did not process this appeal on the grounds that one
14 inmate cannot appeal on behalf of another inmate pursuant to
15 § 3084.2(d) and that the appeal did not comply with the
16 § 3084.6(c) requirement that an appeal must be filed within fifteen
17 working days of the decision or action that is the subject of the
18 appeal.

19 Section 3084.2(d) provides, "An inmate . . . shall not submit
20 an appeal on behalf of another inmate . . ., except as provided in
21 subsection (f)." As indicated above, § 3084.2(f) authorizes group
22 appeals when a decision, action or policy affects all members of
23 the group.

24 Plaintiffs responded to Defendants' refusal to process the
25 appeal by filing a statement that they were challenging the
26 director's policy mandating that an inmate housed in the SHU had to
27 become an informant to obtain release from the SHU. Plaintiffs
28

1 stated that the director's policy affected both of them and
2 "contrary to your view, there is no specified time limit to file a
3 602 challenging a CDCR policy." Defendants repeated in their reply
4 that the appeal exceeded the fifteen working day time limit, that
5 one inmate cannot appeal on behalf of another, and that Plaintiffs
6 were attempting to appeal a policy which had been well-established
7 for many years. On January 14, 2004, Defendant Grannis returned
8 Plaintiffs' appeal to them on the ground that it had been rejected,
9 withdrawn or cancelled. Plaintiffs did not re-file their appeal at
10 the second and third levels of review.

11 Thus, appeal 03-2721 does not exhaust any of the claims at
12 issue.

13 4. Ashker's Appeal 05-01551

14 Ashker claims that this appeal exhausted his challenge to
15 Defendants' policy of keeping inmates in the SHU unless they became
16 informants. Ashker Dec. ¶¶ 46, 53-54, Ex. 8. This appeal was
17 exhausted on December 13, 2005. The present complaint was filed on
18 August 11, 2005. Because a prisoner must have exhausted all of his
19 available remedies before filing suit, even if the prisoner fully
20 exhausts while the suit is pending, appeal 05-01551 does not
21 exhaust any of the present claims.

22 5. Troxell's Appeal, Troxell Dec., Ex. 2⁵

23 Troxell claims that this appeal, filed on February 16, 2004,
24 exhausted his claim based on his classification as an active gang
25 member. Troxell ¶ 9, Ex. 2. In this appeal, Troxell challenged a
26

27 ⁵No number is listed on this appeal.

1 June 23, 2001 decision by the Institutional Gang Investigation Unit
2 (IGI) that he was an active gang member. This appeal was screened
3 out based on § 3084.6(c)'s requirement that appeals be filed within
4 fifteen working days of the event or decision at issue. As noted,
5 proper exhaustion of an appeal requires "compliance with an
6 agency's deadlines and other critical procedural rules." Woodford,
7 126 S. Ct. at 2382. Thus, this appeal does not exhaust any of the
8 claims at issue.

9 6. Troxell's Appeal, Troxell Dec., Ex. 3⁶

10 Troxell claims that this appeal, filed on November 8, 2004,
11 exhausted his challenge to the inactive gang status classification
12 criteria used by the CDCR. Troxell Dec. ¶ 15, Ex. 3. Troxell
13 admits that he was informed that his appeal was beyond the fifteen
14 day time limit. Id. at ¶ 17. Again, because he did not comply
15 with section 3084.6(c), Troxell has not properly exhausted this
16 challenge.

17 7. Troxell's Appeal 05-01550

18 Troxell claims that this appeal exhausted his challenge to
19 Defendants' policy of subjecting him to indeterminate SHU status
20 due to his AB association. Troxell Dec. ¶ 20, Ex. 4. This
21 challenge was exhausted on December 15, 2005. Id., Ex. 4. The
22 present complaint was filed on August 11, 2005. Because a prisoner
23 must exhaust all of his available remedies before filing suit, even
24 if the prisoner fully exhausts while the suit is pending, appeal
25 05-01550 does not exhaust any of the present claims.

26
27 ⁶No number is listed on this appeal.

1 8. Troxell's Appeal, Troxell Dec., Ex. 5⁷

2 Troxell claims that this appeal, submitted on October 29,
3 2003, exhausted his administrative remedies regarding his challenge
4 to the BPH July 10, 2001 decision denying him a parole date.
5 Troxell Dec. ¶¶ 28-29, Ex. 5. However, this appeal was dismissed
6 as untimely because it was filed over two years after Troxell's
7 parole hearing; the appeal deadline is ninety days from the date of
8 the parole denial. Thus, Troxell's appeal in Troxell Dec., Ex. 5
9 does not exhaust any of the claims at issue.⁸

10 C. Which Causes of Action are Exhausted

11 To determine which of Plaintiffs' causes of action are
12 exhausted, the Court compares the appeals that have been properly
13 exhausted with Plaintiffs' causes of action to determine whether
14 the exhausted appeals provided Defendants with a full and fair
15 opportunity to adjudicate the causes of action.

16 1. First Cause of Action: Right of Association

17 None of the appeals submitted by Plaintiffs addresses the
18 issue of the violation of their First Amendment right of
19 association. Therefore, the first cause of action is not exhausted
20 and must be dismissed. It is dismissed without prejudice to
21 refiling once it is properly exhausted.

22
23
24 ⁷No number is listed on this appeal.

25 ⁸Troxell states in his declaration that the BPH hearing on
26 January 10, 2006 is relevant and related to the claims in his
27 complaint. However, any claim regarding a January 10, 2006 hearing
28 would have to be timely exhausted and then sued on in federal
court. Troxell submits no evidence that he has exhausted this
appeal.

2. Third Cause of Action: Fifth Amendment, Self-Incrimination and Procedural and Substantive Due Process

(a) Self-Incrimination

Ashker contends that Appeal 04-00566 put Defendants on notice that they are violating Plaintiffs' right against self-incrimination. Defendants argue that this appeal only challenged the fact that, because Plaintiffs are housed in the SHU, they are not provided access to vocational, recreational and educational programs that are provided to the general prison population. Plaintiffs acknowledge that the original appeal addressed only their lack of access to vocational, recreational and educational programs, but argue that their appeal "evolved" as it was processed.

After reviewing appeal 04-00566 in its entirety, the Court can find only one reference that could have alerted Defendants to the fact that Plaintiffs were raising a claim regarding their right against self-incrimination. This is the statement, in the answer to Defendants' denial of the first level appeal, that Plaintiffs are faced with "a Hobson's choice of agreeing to become a successful (CDC) informant (and thus being able to participate in programs, etc. and thereby receive meaningful consideration for a parole date), or doing life without parole in (SHU)." This statement was insufficient to provide Defendants a full and fair opportunity to adjudicate the constitutional issue of Plaintiffs' right against self-incrimination. First, the issue was mentioned only in terms of how it affected Plaintiffs' participation in various programs. Second, this statement appeared only in one

1 brief sentence in the middle of a very long response to Defendants'
2 denial of the original appeal. It was not apparent from this
3 sentence that Plaintiffs were raising it as a separate claim.

4 Therefore, the claim for violation of the privilege against
5 self-incrimination is not properly exhausted. It is dismissed
6 without prejudice to refiling once it is properly exhausted.

7 (b) Procedural and Substantive Due Process Based on
8 Refusal to Debrief

9 Plaintiffs argue that appeals 03-2721, Ashker's Ex. 7, and
10 05-1551, Ashker's Ex. 8, exhaust the procedural and substantive due
11 process claims in the third cause of action. However, as indicated
12 above, appeal 03-2721 was rejected at the first level on the
13 grounds that it was untimely and that one inmate cannot appeal on
14 behalf of another. Plaintiffs did not take it to the second and
15 third levels. Thus it does not exhaust any of the claims at issue.

16 Appeal 05-01551 was fully exhausted on December 13, 2005, but
17 this complaint had been filed on August 11, 2005. Because a
18 prisoner must have exhausted all available remedies before filing
19 suit, appeal 05-1551 does not exhaust any of the present claims.
20 Because appeal 05-1551 may address Ashker's procedural and
21 substantive due process claims, these claims are dismissed without
22 prejudice to refiling in a new complaint.

23 C. Fourth Cause of Action: Cruel and Unusual Punishment

24 Plaintiffs argue that appeals 04-0566 and 03-2721 exhaust this
25 claim. However, appeal 04-0566 did not address ASHker's right
26 against cruel and unusual punishment; it addressed Ashker's
27 inability to participate in certain programs. Appeal 03-2721 was
28

1 not processed at the first level on the grounds that it was
2 untimely and that one inmate cannot appeal on behalf of another.
3 It was not taken to the second or third levels. Therefore, this
4 claim is not exhausted and is dismissed without prejudice to
5 refiling once it is exhausted.

6 D. Fifth Cause of Action

7 1. Violation of Ex Post Facto Clause and Violation of
8 Liberty Interest in Not Being Granted Parole

9 The United States Constitution prohibits the federal
10 government and the States from passing any "ex post facto Law."
11 U.S. Const., Art. I, § 9, cl. 3 (federal government); Art. I, § 10,
12 cl. 1 (States). These clauses prohibit the government from
13 enacting laws with certain retroactive effects: any law that
14 (1) makes criminal an act done before the passing of the law, which
15 was innocent when done; (2) aggravates a crime or makes it greater
16 than it was when it was committed; (3) inflicts a greater
17 punishment for the crime than the punishment authorized by law when
18 the crime was committed; or (4) alters the legal rules of evidence
19 and requires less or different testimony to convict the defendant
20 than was required at the time the crime was committed. See Stogner
21 v. California, 539 U.S. 607, 611-12 (2003); Carmell v. Texas, 529
22 U.S. 513, 519-538 (2000).

23 While there is "no constitutional or inherent right of a
24 convicted person to be conditionally released before the expiration
25 of a valid sentence," Greenholtz v. Inmates of Nebraska Penal &
26 Corr. Complex, 442 U.S. 1, 7 (1979), a State's statutory parole
27 scheme, if it uses mandatory language, may create a presumption
28

1 that parole release will be granted when or unless certain
2 designated findings are made, and thereby give rise to a
3 constitutionally protected liberty interest, see Board of Pardons
4 v. Allen, 482 U.S. 369, 376-78 (1987) (Montana parole statute
5 providing that board "shall" release prisoner, subject to certain
6 restrictions, creates due process liberty interest in release on
7 parole). In such a case, a prisoner gains a legitimate expectation
8 in parole that cannot be denied without adequate procedural due
9 process protections. Id. at 373-81; Greenholtz, 442 U.S. at 11-16.

10 California's parole scheme uses mandatory language and is
11 largely parallel to the schemes found in Allen and Greenholtz to
12 give rise to a protected liberty interest in release on parole:

13 The panel or board shall set a release date unless it
14 determines that the gravity of the current convicted
15 offense or offenses, or the timing and gravity of current
16 or past convicted offense or offenses, is such that
17 consideration of the public safety requires a more
lengthy period of incarceration for this individual, and
that a parole date, therefore, cannot be fixed at this
meeting.

18 Cal. Penal Code § 3041(b). Accordingly, under the clearly
19 established framework of Allen and Greenholtz, "California's parole
20 scheme gives rise to a cognizable liberty interest in release on
21 parole." McQuillion v. Duncan, 306 F.3d 895, 902 (9th Cir. 2002).

22 The scheme creates a presumption that parole release will be
23 granted unless the statutorily defined determinations are made.
24 Id. This is true regardless of whether a parole release date has
25 ever been set for the inmate, because "[t]he liberty interest is
26 created, not upon the grant of a parole date, but upon the
27 incarceration of the inmate." Biggs v. Terhune, 334 F.3d 910, 915-

1 16 (9th Cir. 2003). The Ninth Circuit recently made clear that
 2 "California inmates continue to have a liberty interest in parole
 3 after In re Dannenberg, 34 Cal. 4th 1061 (2005)." Sass v.
 4 California Bd. of Prison Terms, 461 F.3d 1123, 1125 (9th Cir.
 5 2006).

6 Where an inmate challenges the constitutional validity of the
 7 state procedures used to deny parole eligibility or parole
 8 suitability, but seeks injunctive relief in the form of an earlier
 9 eligibility review or parole hearing rather than earlier release,
 10 the claim is cognizable under § 1983. Wilkinson v. Dotson, 544
 11 U.S. 74, 82 (2005);⁹ see also Neal v. Shimoda, 131 F.3d 818, 824
 12 (9th Cir. 1997) (if prisoner wins civil rights claim and is
 13 entitled to parole eligibility hearing, this does not guarantee
 14 parole or necessarily shorten his prison sentence). Challenges to
 15 state parole eligibility decisions or procedures must be brought in
 16 habeas if success will necessarily result in immediate or speedier
 17 release. Anyanwutaku v. Moore, 151 F.3d 1053, 1055-56 (D.C. Cir.
 18 1998).

19 Ashker has properly exhausted an appeal to the BPH of a BPH
 20 parole denial, Ashker Dec., Ex. 9; Kenny Dec., Ex. D, although
 21 Troxell has not. In his appeal, Ashker claimed that the BPH's
 22 decision violated the ex post facto clause. However, if Ashker is

23
 24 ⁹This does not mean that such a claim may not be brought in
 25 habeas as well: "[W]hen prison inmates seek only equitable relief
 26 in challenging aspects of their parole review that, so long as they
 27 prevail, could potentially affect the duration of their
 28 confinement, such relief is available under the federal habeas
 statute." Docken v. Chase, 393 F.3d 1024, 1028 (9th Cir. 2004).
 Habeas and § 1983 are not mutually exclusive in such a case. Id.
 at 1031.

1 seeking an earlier release date, as it appears he is, the proper
2 procedure for challenging the denial of his appeal to the BPH is
3 through the filing of a petition for a writ of habeas corpus in
4 state court and presenting all the claims in the petition to the
5 highest state court. Thereafter, he may file a petition for writ
6 of habeas corpus in federal court under the Antiterrorism and
7 Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254.

8 Therefore, the claim based upon the ex post facto clause and
9 the violation of a liberty interest based on parole denial is
10 denied without prejudice to filing in a habeas petition.

11 2. Violation of Procedural and Substantive Due Process

12 This claim alleges that Defendants deny Plaintiffs access to
13 programs required by the BPH thus the BPH does not give meaningful
14 consideration to Plaintiffs' parole requests. It is not properly
15 brought as a civil rights cause of action because Ashker seeks
16 earlier release on parole which, as discussed above in regard to
17 the ex post facto claim, must be sought in a habeas petition.
18 Therefore, this claim is denied without prejudice to filing in a
19 habeas petition after exhaustion of state court remedies.

20 3. Violation of Equal Protection Based on Treating White
21 Inmates Differently than Other Races

22 The only appeal that mentioned an equal protection claim is
23 appeal 04-0566. In his response to Defendants' first level denial
24 of this appeal, Ashker requested that PBSP "halt the longstanding
25 practice of subjecting white (SHU) prisoners to more isolation
26 (from their social group -- other whites) than any other 'ethnic
27 groups' in (PBSP--SHU)."
28

1 However, as discussed above, appeal 04-0566 only addressed the
2 lack of programming available to Ashker. Therefore, this appeal
3 did not exhaust the equal protection claim.

4 4. Violation of Due Process Based on AB Validation
5 Procedures

6 Ashker's appeals 01-2335 and 04-2600¹⁰ and Troxell's appeal 88-
7 1657 exhaust the due process claims based on Defendants' AB
8 validation procedures. However, some allegations in this cause of
9 action address due process violations based on parole denial. To
10 the extent that this claim addresses the AB validation procedure,
11 it is exhausted and may proceed; to the extent it addresses the
12 denial of a parole release date, it is denied without prejudice to
13 filing as a habeas petition after exhaustion of state court
14 remedies.

15 E. Summary

16 The only claim addressed in Defendants' motion that has been
17 exhausted is Plaintiffs' claim that their due process rights are
18 violated by Defendants' procedure for validating them as active or
19 inactive gang members. The proper treatment of a mixed complaint,
20 i.e., a complaint with both exhausted and unexhausted claims, will
21 depend on the relatedness of the claims contained within. Lira v.
22 Herrera, 427 F.3d 1164, 1175 (9th Cir. 2005). When a prisoner has
23 filed a mixed complaint and wishes to proceed with only the

24
25 ¹⁰Defendants argue that appeal 04-0566 does not relate to any
26 claim in the complaint because none of the claims address gang
27 validation or inactive gang status. However, Ashker's due process
28 claims challenging the procedure used to determine an inmate's gang
status involves a determination of whether the inmate is an active
or inactive gang member.

1 exhausted claims, the district court should dismiss the unexhausted
2 claims when they are not intertwined with the exhausted claims.
3 Id. On the other hand, when a plaintiff's mixed complaint includes
4 exhausted and unexhausted claims that are closely related and
5 difficult to untangle, dismissal of the defective complaint with
6 leave to amend to allege only fully exhausted claims is the proper
7 approach. Id. at 1176.

8 The Court will allow the four exhausted claims to proceed even
9 though many of the claims in the complaint have been dismissed for
10 failure to exhaust.

11 In summary, the following causes of action may be prosecuted:
12 (1) Plaintiffs' second cause of action for a First Amendment
13 violation premised on Defendants' not allowing Plaintiffs access to
14 certain magazines; (2) Plaintiffs' due process claim based on
15 Defendants' procedure for determining whether Plaintiffs are active
16 or inactive gang members; (3) Plaintiffs' sixth cause of action for
17 negligence and (4) Plaintiffs' seventh cause of action for an
18 intentional tort.

19 III. Second Amended Complaint

20 Plaintiffs move for leave to file a second amended complaint
21 (SAC) (Docket No. 94), to add Susan Fisher and Robert Harmon, BPH
22 commissioners who presided at Troxell's January 10, 2006 parole
23 hearing, as additional Defendants, and to add two claims:

24 (1) violation of Plaintiffs' First Amendment right not to speak by
25 requiring them to become informants in order to be released from
26 the SHU; and (2) violation of Plaintiffs' Eighth Amendment right to
27 be free from cruel and unusual punishment in that prolonged

1 isolation in the SHU adversely affects Plaintiffs' mental health.
2 Defendants have not filed an opposition to Plaintiffs' motion to
3 file a SAC.

4 In this Order, the Court has stated that Troxell may not bring
5 any claim based on his January 10, 2006 parole hearing because he
6 has submitted no evidence that this claim was exhausted.
7 Therefore, the Court DENIES Plaintiffs' motion to add Fisher and
8 Harmon as Defendants because there is no properly exhausted claim
9 against them.

10 The Court orders Defendants to file any opposition to
11 Plaintiffs' motion to add two additional claims no later than two
12 weeks from the date of this order. Plaintiffs may file a reply no
13 later than two weeks after Defendants' opposition is served on
14 Plaintiffs. Because there may be a statute of limitations issue
15 regarding the due process claim addressing Defendants' AB
16 validation procedure, Defendants are to provide further briefing on
17 the statute of limitations issue in their opposition to Plaintiffs'
18 motion to add two additional claims. Plaintiffs may file a reply
19 no later than two weeks after Defendants' opposition is served on
20 Plaintiffs.

21 CONCLUSION

22 For the foregoing reasons,

23 1. Defendants' motion to dismiss without prejudice the first,
24 third, fourth and a portion of the fifth cause of action in the FAC
25 (Docket no. 75) is GRANTED.

26 2. Defendants' motion to dismiss the due process claim in the
27 fifth cause of action based on the AB validation procedure is

1 DENIED.

2 3. Plaintiffs' motion to file an SAC is DENIED in regard to
3 adding two new Defendants. Defendants may file an opposition to
4 the motion to file two new claims; the schedule for filing briefs
5 is stated above.

6 4. Plaintiffs' motion for leave to file a memorandum of
7 points and authorities in excess of twenty-five pages (Docket no.
8 89) is GRANTED in light of Plaintiffs' pro se status. Plaintiffs'
9 motion to supplement their opposition to their motion to dismiss
10 (Docket no. 98) is GRANTED because Defendants raised new arguments
11 in their reply brief. Plaintiffs' motion to continue trial date
12 and associated discovery, motion and conference dates (Docket no.
13 103) is GRANTED. The trial and discovery dates are vacated. Ten
14 days after the Court rules on Plaintiffs' motion to add two new
15 claims to their complaint, Plaintiffs and Defendants shall submit
16 proposed schedules suggesting new dates for discovery, motions, a
17 pretrial conference, and trial.

18 5. This order terminates Docket Nos. 75, 89, 98, and 103.

19 IT IS SO ORDERED.

20
21 Dated: 6/14/07



CLAUDIA WILKEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

ASHKER ET AL et al,

Case Number: CV05-03286 CW

Plaintiff,

CERTIFICATE OF SERVICE

v.

SCHWARZENEGGER ET AL et al,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on June 14, 2007, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Dated: June 14, 2007

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk